

In the Matter of Merchant Mariner's Document No. Z-196479 and all other Seaman Documents
Issued to: WALLACE N. LEWIS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD
(REMANDED APPEAL NO. 923)

999

WALLACE N. LEWIS

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

Pursuant to the Commandant's order of 9 October 1956 which remanded this case for further proceedings, the hearing was reopened on 13 November 1956 at New York City by the same Examiner of the United States Coast Guard who had presided at the original hearing.

By order dated 25 January 1957, the Examiner again revoked Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as Second Cook and Baker on board the American SS AFRICAN GROVE under authority of the document above described, on or about 31 May 1955, Appellant wrongfully struck and kicked crew member Boatswain Hugo Kaaman; Appellant wrongfully struck another member of the crew, ordinary seaman Walter O'Connor.

At the beginning of the original hearing in July 1955, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. When the hearing was reopened, Appellant was represented by counsel of his own choice. His prior plea of not guilty to the charge and each specification remained unchanged.

In accordance with the directions on remand, Chief Steward Scott appeared for cross-examination by the defense. Third Cook Gibson testified on behalf of Appellant and Appellant took the witness stand in his defense. Appellant testified that he walked away when Kaaman entered the galley and said he wanted to talk to appellant; but he then turned and struck the first blow because he thought Kaaman was going to start a fight when he put his hand on Appellant's shoulder; O'Connor was struck when he approached just as Appellant freed his leg from Kaaman's grasp by slapping him in the face while he was on the deck.

The evidence submitted by the Investigating Officer at the earlier hearing was also considered by the Examiner in rendering his decision. This consisted of various documentary exhibits, the testimony of Boatswain Kaaman and the direct examination of Chief Steward Scott by the Investigating Officer.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he concluded that the charge and two specifications had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served and Appellant surrendered his document on 28 January 1957. Appeal was timely filed on 28 February 1957. No elaboration on appeal has been received since counsel was furnished with a copy of the transcript on 5 July 1957.

FINDINGS OF FACT

On 31 May 1955, Appellant was serving as Second Cook and Baker on board the American SS AFRICAN GROVE and acting under authority of his Merchant Mariner's Document No. Z-196479 while the ship was at sea two days out of Durban, South Africa.

Shortly after 1200 on this date, Boatswain Kaaman entered the galley where Appellant was performing his duties as baker. The Boatswain approached Appellant and told him that he, Kaaman, was sorry if he had insulted Appellant on a prior occasion. The Boatswain had been drinking alcoholic beverages and his voice was loud. Four other members of the crew were present including Chief Steward Scott and Third Cook Gibson. Appellant did not want to discuss the matter and he took several steps toward the port entrance which was opposite the doorway through which the Boatswain had come into the galley.

The Boatswain followed, placed his hand on Appellant's shoulder and told Appellant that he would talk the matter over if he were a man. In the meanwhile, Appellant had removed his eyeglasses. Without reply, Appellant turned to face the Boatswain and immediately struck him on the face with such a forceful blow that he fell against the starboard bulkhead which was more than eight feet away. Since the Boatswain was still in an upright position, Appellant followed up with a second blow which caused the Boatswain to fall across a wooden crate on the deck and shatter it. The Boatswain landed on deck with his head extending over the starboard door coaming into the passageway. Appellant stood over the Boatswain, striking and kicking him until after he was unconscious.

Walter O'Connor, a friend of Kaaman's arrived and attempted to stop Appellant but he struck O'Connor with one blow knocking him down in the passageway. Appellant then stopped boating the Boatswain as the Master and Chief Officer appeared on the scene after hearing the noise coming from the galley. The Boatswain suffered a broken jaw and three fractured ribs. He was hospitalized in the next port.

Appellant is approximately 42 years of age, 5 feet, 5 1/2 inches tall and weighed about 182 pounds. Appellant exercised with her bar bells in order to build up his strength. The Boatswain is 51 years old, 6 feet tall and weighed in the vicinity of 190 pounds at the time of this incident. O'Connor is a smaller man weighing about 160 pounds.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

POINT I. The decision was against the weight of the evidence. The testimony of the Chief Steward was prejudiced because he had been accused by Appellant of stealing his protein pills. It is incredible that Appellant, who has been going to sea since 1939 without a prior record, would strike a man if he came to apologize to Appellant. After sporadic provocation by severely beaten a crew member a week before, Appellant had good reason to believe that he was being attacked when he felt himself being touched from behind and turned around by Kaaman.

POINT II. The decision was contrary to the law. Under the circumstances, Appellant had reasonable grounds for his belief that there was imminent danger to his person and to be in fear of Kaaman. Consequently, Appellant had the right to act in self-defense without retreating and his use of excessive force in the heat of battle was excusable.

POINT III. The order of revocation was too severe since the conduct of Kaaman and O'Connor was provocation for the blows struck by Appellant who was not a person of a violent character.

In conclusion, it is submitted that the conclusion of guilty should be reversed; or, alternatively, the order should be modified to provide for a short period of probation.

APPEARANCE: Sol S. Zuckerman of New York City by Richard B. Schwartz, Esquire, of Counsel.

OPINION

The decision of the Examiner and the above findings of fact are supported primarily by the testimony of Chief Steward Scott and Boatswain Kaaman; and, to some extent, by the testimony of Appellant. Although the testimony of all the witnesses was discredited to some degree, there is substantial evidence to support the Examiner's findings that Appellant wrongfully struck both Kaaman and O'Connor; and that Appellant further belabored Kaaman while he was lying helpless on the deck. Since the judgement of the trier of the facts may not be set aside on appeal unless it is "clearly erroneous" (McAllister v. United States (1954), 348 U.S. 19), the Examiner's conclusions and order will be sustained.

As to the credibility of the witnesses, the Examiner who saw and heard them testify was in the best position to judge this matter. On the basis of the cold record alone, possible discredit as to veracity seems to be about equally distributed. Appellant and Kaaman obviously had a personal interest in the matter. The Chief Steward may have been prejudiced by the accusation that he took Appellant's protein pills; and the Chief Steward's testimony was detracted from by his inaccurate

statement that Kaaman was unconscious all the next day and by the original denial of the Chief Steward that he had a disciplinary record with the Coast Guard. On the other hand, the testimony of Appellant's witness, Third Cook Gibson, is vague as to how the fight started after Appellant turned around; and Gibson's version that both seamen then rolled around on the deck punching each other is not even supported by Appellant's testimony. For these reasons, the impressions of the Examiner, based on his personal observation of the witnesses, must be given serious consideration.

Appellant's testimony is in accord with the above findings as to what occurred in the galley up to the time when Kaaman was knocked to the deck by Appellant's second blow. At first, Appellant stated that he was turned around by Kaaman (R. 97, 99) but later in Appellant's testimony, he stated that he turned around of his own accord when he felt Kaaman's testimony, he stated that he turned around of his own accord when he felt Kaaman's hand on his shoulder. Third Cook Gibson's testimony agrees with the latter account. Both Appellant and his witness testified that Kaaman made any movement to strike Appellant. There is no evidence that Kaaman made any movement to strike Appellant. On the contrary, even Appellant's testimony supports the version that he turned and struck Kaaman a very hard blow on the face before Kaaman could raise his hands in defense. Consequently, it is conclusively established that Kaaman was taken completely by surprised and never had a chance to fight back after he was hit the first time.

Appellant's defense to this conduct is that prior provocation by Kaaman and O'Connor, followed by the touching of Appellant's shoulder, gave him reasonable cause to believe that Kaaman was going to start a fight and that Appellant wanted to get in the first blow due to his fear of Kaaman after hearing about his reputation for violence.

Under the prevailing circumstances, it is my opinion that there was not an adequate basis for such fear by Appellant. The Examiner's finding has been accepted that Kaaman entered the galley and apologized to Appellant. Kaaman then asked Appellant to talk the matter over when he started to walk away. While doing this, Kaaman placed his hand on Appellant's shoulder but did not attempt to physically restrain him in any manner. Appellant could have continued to walk away or turn and discuss the matter with Kaaman. If Kaaman had then started a fight, Appellant would have had the right to retaliate. This does not mean that in all cases, a person must wait until the first blow is struck before he can act in self-defense. But in view of the above facts and the indications in the record that Appellant is a very powerful man,, it does not appear that Appellant was in any immediate danger when he turned and struck Kaaman without warning. The force of Appellant's first blow and the reluctance of any of the four eyewitnesses to interfere after Kaaman was practically unconscious indicate the ability of Appellant to take care of himself.

Appellant's testimony disagrees with that of Chief Steward Scott as to what occurred after Kaaman was knocked to the deck. Appellant claims that he merely slapped Kaaman once in the face in order to make him let go of Appellant's leg which Kaaman grabbed when he fell to the deck (R. 99). The Chief Steward testified that Appellant brutally kicked and punched Kaaman (R. 39 of first hearing record). The Examiner accepted the testimony of the Chief Steward. In addition to the Examiner's observation of the appearances of the witnesses, he based his choice of versions on the

consideration that it was difficult to understand "how Kaaman, in the position in which he was lying, could have maintained a solid grip on the leg of the person charged . . . " It seems to me that it is also important to question the credibility of Appellant's testimony on this point because of the improbability that Kaaman could have grasped Appellant's leg as Kaaman fell across a wooden crate and onto the deck. Also, the Chief Steward's testimony about the kicking is corroborated to some extent by Kaaman's testimony that the last thing he remembered was seeing a shoe or part of a shoe. This must have been one of Appellant's shoes.

It is because of these facts in aggravation of the assault and battery upon Kaaman that the severe order of revocation is appropriate in this case regardless of Appellant's prior clear record during many years at sea. Even if Appellant's original attack was based on an honest though mistaken belief that he was in danger, there was no reason whatever for such a savage beating after Kaaman was lying on the deck helpless and defenseless. This was clearly inexcusable excessive force and violence. It is relatively unimportant whether Kaaman received the fractured jaw and ribs before or after he fell to the deck. No determination of this factor is contained in the record.

Under these circumstances, it was obviously wrongful for Appellant to strike O'Connor when he attempted to make Appellant stop his unmerciful beating of Kaaman.

ORDER

The order of the Examiner dated at New York, New York, on 25 January 1957 is ~~REVERSED~~ **AFFIRMED**.

J. A. Hirshfield
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 27th day of December, 1957.